APPENDIX A

Guy Mason,

Petitioner-Appellant,

v.

Charles R. Balkcom, Warden,

Respondent-Appellee.

No. 80-7344.

United States Court of Appeals
Fifth Circuit*
Unit B

March 1, 1982

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, HILL and THOMAS A. CLARK, Circuit Judges.

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 -- October 14, 1980.

THOMAS A. CLARK, Circuit Judge:

Petitioner, Guy Mason, appeals from the district court's order and judgment denying his petition for a writ of habeas corpus. We reverse.

In January, 1975, petitioner was convicted of murder and sentenced to death after a jury trial in the Superior Court of Baldwin County, Georgia.[1] On direct appeal and the

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1/ The facts underlying Mason's conviction are set forth in the opinion issued by the Georgia Supreme Court on Mason's direct appeal. Mason v. State, 236 Ga. 46, 46-47, 222 S.E.2d 339, 340-341, cert. denied, 428 U.S. 910, 96 S.Ct. 3225, 49 L.Ed.2d 1219 (1976).

mandatory sentence review,[2] petitioner's conviction and sentence were affirmed by the Georgia Supreme Court, Mason v. State, 236 Ga. 46, 222 S.E.2d 339 (1976), and certiorari was denied by the United States Supreme Court, Mason v. Georgia, 428 U.S. 910, 96 S.Ct. 3225, 49 L.Ed.2d 1219 (1976).

Petitioner subsequently petitioned for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. The state habeas action was continued to permit petitioner to file an extraordinary motion for a new trial in the Baldwin County Superior Court. Following an evidentiary

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2/ Under Georgia's capital sentencing procedure, all death sentences must be reviewed by the Georgia Supreme Court. Ga. Code Ann. § 27-2537.

hearing, the motion was denied on March 18, 1977. On appeal, the Georgia Supreme Court affirmed the denial of the extraordinary motion. Mason v. State, 239 Ga. 538, 238 S.E.2d 79 (1977). On January 26, 1978, an evidentiary hearing commenced on petitioner's state habeas action in the Tattnall County Superior Court. That court denied habeas relief in an order and written opinion entered on July 13, 1978. Mason v. Hopper, No. 76-218 (Super.Ct. Tattnall Cty., July 13, 1978). From the adverse decision of the state habeas court, petitioner filed an application for a certificate of probable cause to appeal to the Georgia Supreme Court. The certificate was denied on October 3, 1978.

Petitioner next filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia pursuant to 28 U.S.C. § 2254. The district court ordered petitioner's execution stayed pending final resolution of the habeas action. On April 7, 1980, the district court denied the petition for the writ but left intact the stay of execution. Mason v. Balkcom, 487 F.Supp. 554 (M.D. Ga. 1980). Petitioner now appeals to this court from the district court's denial of his petition.

Five issues are raised on this appeal. Petitioner contends (1) that the trial court's instructions to the jury created a presumption of intent to kill, thereby unconstitutionally

relieving the state of its burden of proving an essential element of the crime of murder and depriving petitioner of due process of law, and that the erroneous charge cannot be dismissed as harmless error; (2) that the trial court's instructions on voluntary manslaughter impermissibly created a presumption of "deliberate revenge" without regard to petitioner's actual thought processes, thus depriving him of due process by relieving the state of its burden of proof; (3) that a venireman was improperly excluded from service on the jury on less than "unmistakably clear" indication that his opposition to capital punishment would automatically impair his ability to consider a death sentence; (4) that his

conviction and sentence cannot stand because one of the jurors, prior to the conclusion of the guilt phase of the trial, became aware through newspaper accounts that petitioner had been convicted of murder previously; and (5) that his death sentence cannot stand because the record lacks a transcript of the prosecutor's closing argument, portions of which provoked objection, making it impossible for a reviewing court to determine whether the argument was unfairly prejudicial to the petitioner.

For the reasons expressed below, we reverse. In so doing, however, we reach only the first issue because its disposition makes resolution of issues (2), (3), (4), and (5) unnecessary.

Petitioner was convicted of murder under Ga. Code Ann. § 26-1101 (a), which provides:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

The statute defines murder to consist of the following elements: (1) unlawfully (2) causing the death of another human being (3) with malice aforethought. Holloway v. McElroy, 474 F.Supp. 1363, 1368 (M.D. Ga. 1979). Malice is defined as a "deliberate

intention" unlawfully to kill another human being. Thus, because malice is an element of murder and deliberate intention to kill is an essential part of malice, intent to kill is an essential element of the crime of murder under Ga. Code Ann. § 26-1101 (a). Under the due process clause of the fourteenth amendment, the state must prove the existence of every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecution therefore had the burden to prove beyond a reasonable doubt that petitioner had the requisite intent to kill.

Petitioner contends that certain instructions given to the jury by the

trial court had the effect of relieving the prosecution of this burden by creating a presumption of his intent to kill. The instructions at issue here are as follows:

> I charge you that the law presumes that a person intends to accomplish the natural and probable consequences of his conduct, and where a person uses a deadly weapon in the manner in which such weapons are ordinarily employed to produce death, thereby causing the death of a human being the law presumes an intention to kill.
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> I further charge you that if you believe beyond a reasonable doubt that the defendant . . ., with the weapon named in the indictment, and with malice aforethought, either expressed or implied, did unlawfully kill the victim . . ., and you believe the weapon used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder.

The district court, relying primarily on Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), found that these instructions "impermissibly shifted the burden of proof on the issue of intent to kill to the defendant or at least removed from the prosecution the full burden resting upon it under In re Winship." 487 F.Supp. at 559. The district court went on to hold, however, that the erroneous charge was harmless beyond a reasonable doubt.

Petitioner, of course, agrees with the district court's finding that the charge erroneously shifted the burden of proof to him on the issue of intent to kill, but argues that the district court incorrectly held the erroneous charge to be

harmless error. Respondent, on the other hand, first contends that the instructions in question did not shift the burden of proof to the petitioner on the issue of intent. Alternatively, respondent takes the position that if the charge did shift the burden to petitioner, then the district court correctly concluded that the error was harmless beyond a reasonable doubt. Thus, our analysis of this issue is twofold: (1) Did the instructions in question shift the burden of proof to the petitioner on the issue of intent to kill in violation of the due process clause of the fourteenth amendment? (2) If so, can the erroneous charge be characterized as harmless error beyond a reasonable doubt?

This case is very similar to Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] In Sandstrom, the defendant was convicted under the Montana law of "deliberate homicide," which the statute defined as "purposely or knowingly" causing the death of another human being.[4] The state conceded that "purpose" was equivalent to "intent," and thus that proof of defendant's intent to kill would suffice to establish the "purpose"

3/ When petitioner's conviction was reviewed on direct appeal in 1976, the Georgia Supreme Court held that the instructions in question were not erroneous. Mason v. State, 236 Ga. 46, 47-48, 222 S.E.2d 339, 341 (1976). That ruling was made, however, without the benefit of the United States Supreme Court's reasoning in Sandstrom, which was not decided until 1979.

4/ 1947 Mont.Rev.Codes §§ 94-5-101, -102 (Crim. Code 1973).

element. Id at 521 & n.11, 99 S.Ct. at 2258 & n.11. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court held that this instruction was unconstitutional because it "had the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind." Id. at 521, 99 S.Ct. at 2458.

In Sandstrom, the state argued that the Montana Supreme Court had exclusive authority to determine the effect of the presumption. The state supreme court had held that the instruction placed only a burden of producing some evidence on the

defendant, and that the presumption thus affected only the burden of going forward with the evidence rather than the burden of persuasion. The Supreme Court conceded that the state supreme court was the final authority on the effect of a presumption under state law, but declared that the state court was "not" the final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516-17, 99 S.Ct. at 2455. The Court then found that, although the instruction could be interpreted in the manner suggested by the state, it could also be interpreted in two more stringent ways, neither of which passed constitutional muster:

> First, a reasonable jury could well have interpreted

> the presumption as "conclusive," that is, not technically a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent.

442 U.S. at 517, 99 S.Ct. at 2456. The Court held that either of these two interpretations would have "the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind . . . and that the instruction therefore represents constitutional error," 442 U.S. at

521, 99 S.Ct. at 2458, notwithstanding the fact that the trial court had given other instructions that correctly stated the state's burden of proof.[5]

5/ The potential for these interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proven guilty, and that the State had the burden of proving beyond a reasonable doubt, that the defendant caused the death of the deceased purposely or knowingly . . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. They jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proven beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. Cf. Mullaney v. Wilbur, 421 U.S. 684, 703 (Footnote continued on next page).

We agree with the district court's conclusion that the instructions at issue in this case fall clearly within the proscription announced in Sandstrom. Petitioner was convicted of murder, an essential element of which is intent to kill. The trial court instructed the jury that "the law presumes that a person intends to accomplish the natural and probable consequences of his conduct" and that "where a person

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5/ (Continued)

n. 31, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975)("These procedural devices require (in the case of a presumption) . . . the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed . . . fact by having satisfactorily established other facts.").
442 U.S. at 518-19 n.7, 99 S.Ct. at 2456 n. 7.

uses a deadly weapon . . . thereby causing the death of a human being the law presumes an intention to kill." In asserting self-defense, petitioner was required to admit the facts that activated these presumptions. We believe that a reasonable jury could have interpreted the instructions in either of the impermissible ways described in Sandstrom. Therefore, we hold that the challenged instructions relieved the State of Georgia of its constitutional burden of proving every element of the crime of murder beyond a reasonable doubt. Accordingly, petitioner's conviction and sentence must be set aside unless the erroneous charge was harmless beyond a reasonable doubt.

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 17 L.Ed.2d 705 (1967). In determining whether such an error is harmless, the question is whether the error might have contributed to the conviction. Id. at 23, 87 S.Ct. at 827. It is conceivable that an error such as that involved here could be harmless beyond a reasonable doubt under certain circumstances. Indeed, the Supreme Court in Sandstrom expressly stated that the Montana Supreme Court was free on remand to consider the harmless error issue. 442 U.S. at 526-27, 99 S.Ct. at

2461. Athough a burden-shifting charge might be harmless given appropriate circumstances, however, this is not such a case.

Constitutional error might be held harmless beyond a reasonable doubt, for example, where the evidence of guilt is so overwhelming that the error could not have been a contributing factor in the jury's decision to convict. See, e.g., Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). The case under review, however, cannot be so characterized. Although it is clear that petitioner shot and killed the victim, he claimed that he acted in self-defense after he saw the victim reach into her bosom and bring out a pistol. The evidence was

was undisputed that at the time of the kil]ing the victim had a handgun on her person. One eyewitness testified that he saw the victim reach under her sweater and pull out a pistol before petitioner began shooting. Another eyewitness, however, testified that the victim's hands were down by her side when the shooting occurred. This evidence, far from being overwhelming in favor of guilt, was in fact very much in dispute, and we cannot say that the unconstitutional presumption was not a contributing factor in the jury's decision to resolve the dispute against petitioner.

An unconstitutional, burden-shifting instruction might also be

held harmless where it shifts the burden on an element that is not at issue in the trial. See, e.g., United States v. Reeves, 594 F.2d 536 (6th Cir.), cert. denied, 442 U.S. 946, 99 S.Ct. 2893, 61 L.Ed.2d 317 (1979). The district court, taking this approach, found that the challenged instructions were harmless beyond a reasonable doubt because, in its view, intent to kill per se was not at issue in petitioner's trial. The district court stated that:

> The petitioner's only defense to the charges was self-defense. He thereby controverted only that the killing was unlawful and done with premeditation and deliberateness. The issue was not "intent to kill" per se but it was the lawfulness of the killing and of petitioner's intentions with respect thereto. Since the charge of the trial judge clearly

> imposed on the prosecution the burden of proving unlawfulness, premeditation and deliberateness beyond a reasonable doubt and these were the only disputed issues in the case, this court finds that the erroneous charge was harmless beyond a reasonable doubt . . . .

487 F.Supp. at 559. Apparently, the district court believed that by raising self-defense the defendant admitted having the intent to kill. This analysis is too broad. When claiming self-defense, one does not necessarily admit intent to kill, but rather admits that the killing occurred. As the petitioner points out in his brief, one can shoot to kill in self-defense, shoot to wound in self-defense, shoot to frighten in self-defense, or even shoot reactively in self-defense with no specific

purpose. The mere raising of self-defense clearly does not establish that the defendant had the intent to kill. That intent to kill was an issue in petitioner's trial is made evident by the district court's statement that petitioner "controverted only that the killing was . . . done with premeditation and deliberateness." We see no meaningful distinction between "premeditation and deliberateness" and specific intent. A critical issue in petitioner's trial was whether he had the specific intent to kill, and the state had the burden of proving this intent beyond a reasonable doubt. We hold that the instructions which relieved the state of this burden might well have contributed to petitioner's conviction and thus cannot be dismissed as

harmless error. Therefore, the district court must be reversed.

In view of our disposition of the preceding issue, we need not reach the other issues raised here by petitioner. For the reasons expressed in this opinion, the judgment of the district court is REVERSED and this case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

HILL, Circuit Judge, concurring specially:

I agree that we must reverse this case, but differ in my reasons.

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), compels the holding that the jury instruction impermissibly

shifted the burden of proof of intent, vel non, to the petitioner. This is not to say that from a defendant's actions a jury might not draw an inference of intent; it is just that the prosecutor cannot use a presumption against a defendant, presumed innocent, to foreclose the issue.

I would adopt what the district judge wrote on harmlessness but for one omission from the record. Intent does not appear to have been in issue. As Judge Owens noted, intention to kill does not suffice to prove the case. The State is required to prove ". . . deliberate intention to kill a human being without excuse, justification or mitigation." The case apparently put to the jury for decision was whether or not excuse

or justification was present. The erroneous instruction did not relate to that issue and did no harm to its proper resolution. I respectfully disagree with that part of the panel's opinion, referring to the defense of self defense, which says, ". . . we cannot say that the unconstitutional presumption was not a contributing factor in the jury's decision to resolve the dispute against petitioner." The resolution of the self defense claim would be the same whether petitioner's intent was to kill, wound or frighten.

Nothing appears before us to suggest that petitioner questioned the existence of intent to kill in claimed self defense. However, everything does not appear before us.

Under unfortunate procedure then in use in Georgia [1] the argument of defense counsel is not in the record. Summation is an important part of trial. It would be likely that petitioner's attorney pointed out that the evidence was consistent with intent only to frighten the victim or to disable him from further aggression. No matter that such an argument might have failed, defendant was entitled to have it asserted. We cannot know. If it were asserted, it would have been, under the erroneous charge, faced with a presumption that it was invalid. So the error has not

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1/ I am advised that counsel's arguments in such cases are now recorded and made a part of the record.

been shown harmless beyond a reasonable doubt.

Therefore, I concur.

APPENDIX B

Guy MASON, Petitioner,

v.

Charles R. BALKCOM, Warden,

Respondent.

Civ. A. No. 79-127-MAC.

United States District Court,

M. D. Georgia,

Macon Division.

April 7, 1980.

RULING ON PETITION FOR A WRIT OF HABEAS CORPUS

OWENS, District Judge.

The petitioner Guy Mason was convicted of murder and sentenced to death following a jury trial in the Superior Court for Baldwin County; on appeal his conviction and sentence was affirmed by the Georgia Supreme Court. Mason v. State, 236 Ga. 46, 222 S.E.2d 339 (1976). Petitioner next filed for a writ of habeas corpus in the Superior Court for Tattnall County. That habeas action was stayed while the petitioner pursued an extraordinary motion for a new trial in the Baldwin Superior Court; after an evidentiary hearing the extraordinary motion was denied

by the trial judge. That decision was affirmed on appeal by the Georgia Supreme Court. Mason v. State, 239 Ga. 538, 238 S.E.2d 79 (1977). Subsequently, the Tattnall Superior Court held an evidentiary hearing on the habeas petition and denied that petition in a written opinion entered July 13, 1978. Mason v. Hopper, No. 76-218 (Sup.Ct. of Tattnall County, July 13, 1978). The Georgia Supreme Court denied a certificate of probable cause to appeal on October 3, 1978. Following the extensive state litigation described above, the petitioner filed for a writ of habeas corpus in this court pursuant to 28 U.S.C.A. § 2254. The petitioner has raised essentially six arguments of constitutional error, each of which has been

presented to, considered and rejected by the state courts.

I. Facts

The facts surrounding the killing which gave rise to this case are adequately summarized in the opinion of the Georgia Supreme Court entered upon the petitioner's initial appeal.

> On September 2, 1974, about 12:30 p.m., James Copeland drove Guy Mason (the appellant*) and Annie Ruth May (the victim) from their residence to her mother's home. The appellant had two pistols in his possession and gave one of them to the victim. Copeland next saw them at Oscar Davis' Place at approximately 2:30 p.m. that same day in Baldwin County, Georgia.

*"Appellant" was used in place of petitioner Guy Mason's name.

The testimony concerning the events occurring in Oscar Davis' Place and in the street immediately preceding the death is to some degree in conflict. Copeland testified that the victim was arguing with several people, including the appellant.

There is some indication that appellant wanted to leave Oscar Davis' Place, but the victim was not ready. Subsequently, the victim told the appellant that she was ready to go. Appellant left the place first followed by the victim.

The victim's mother, Geneva Simmons, testified that she was present at Oscar Davis' Place but saw nothing of any consequence occur between appellant and the victim. Appellant testified that the victim had threatened to kill him while there. Mary Lee Curry also heard the victim threaten appellant.

J. L. Hitchcock was less than 100 feet from the appellant and the victim when he observed them walk out to the street. Mr. Hitchcock had never seen appellant or the victim before.

He had an unobstructed view of the couple as they entered the street. Mr. Hitchcock saw that the victim's hands were down by her side and saw appellant pull a pistol from his right pocket and fire at the victim four times. They were facing each other as the victim moved backwards and the appellant advanced.

James Dennis testified that he heard a lady cursing and saw her reach under her sweater and pull out a pistol. At that time the man accompanying the lady shot her. Appellant testified that after they left Davis' Place he walked ahead two or three steps, when he turned and saw the victim reach into her bosom and bring out a pistol so that the handle, not the barrel, was visible. He then "went to shooting just like that, how many times I shot I don't know." Appellant further testified that Linda Diane was also with them when he shot the victim. However, James Copeland testified that Linda Diane was with him in Oscar Davis' Place when the victim was shot.

When the shots were fired, Daisey Mae Powell (the victim's sister) ran into Oscar's Place and stated that appellant had just shot Annie Ruth May. James Copeland ran to the scene, and removed the pistol (State's exhibit no. 4) from the victim's bosom and placed it in his belt. James Dennis testified for the appellant that he saw some man remove the pistol from the victim's hand.

Upon arriving at the scene after a call at 3:54 p.m., Officer Thomas Aycock found the victim lying approximately 150 feet from Oscar Davis' Place. She had gunshot wounds in the temple area of her head and the upper part of her right leg.

Appellant surrendered to the Sheriff about 5:00 p.m. on September 2, 1974. He entered the sheriff's office with a pistol in his hand and stated that he had just shot Annie Ruth May.

The pistol allegedly carried by the victim was recovered from a pool room where it had been pawned by James Copeland.

Mason v. State, supra 236 Ga. at 46-7, 222 S.E.2d 339, 340.

The facts concerning events at the petitioner's trial which gave rise to his complaints of constitutional error will be set out below in connection and as relevant to the discussion of each of the petitioner's arguments.

II. The Burden of Proof

The petitioner complains that certain portions of the trial judge's charge either impermissibly relieved the prosecution of its full burden of proof of an essential element of the crime of murder, namely intent, or impermissibly shifted the burden of proof on that element from the prosecution to the petitioner.

Relevant portions of the charge are set out below:

> Now Ladies and Gentlemen, I will read you certain definitions under the Criminal Code of our State Code Section 26-1101 provides in part as follows: "A person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Expressed malice is that deliberate intention unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. (T. 147).
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> . . . . .
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> Now, Ladies and Gentlemen of the Jury, malice is an essential ingredient in the offense of murder, and it must exist before any homicide can be murder. But malice in it's legal sense, is not necessarily ill will or hatred. It is

the unlawful, deliberate intention to kill a human being without excuse, justification, or mitigation. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer a moment before he fires the fatal shot that is sufficient.

I charge you that the law presumes that a person intends to accomplish the natural and probable consequences of his conduct, and where a person uses a deadly weapon in the manner in which such weapons are ordinarily employed to produce death, thereby causing the death of a human being the law presumes an intention to kill. (T. 147-48).

I further charge you that if you believe beyond a reasonable doubt that the defendant in this County, at any time prior to the filing of the indictment, with the weapon named in the indictment, and with malice aforethought, either expressed or implied, did unlawfully kill the victim

named in the indictment, and you believe the weapon used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder. . . . (T. 148).

I charge you the pertinent portions of Code Section 26-901, the fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct . . . . ..

A person is justified in threatening or using force against another, when, and to the extent that he reasonably believes that such threat or force is necessary to defend himself against such others imminent use of lawful force. (T. 149).

I charge you that if you believe his contentions in that he was justified under the principles of law as I have given you in charge, I charge if you believe the defendant's contentions to be the truth of the case, or if there is a reasonable doubt upon your mind, you should acquit the defendant. (T. 149).

. . . . .

I charge you that on the trial of a defendant charged with the crime of murder, the burden is on the State to prove malice either expressed or implied beyond a reasonable doubt, then there can be no verdict of guilty of murder as there can be no murder without malice.

I charge you that malice is a state of mind and is a premeditated, deliberate intention and desire and designed (sic) to unlawfully kill another human being. In this connection I charge you that if you find the defendant acted in self-defense, then there would be no premeditation and deliberation and it would be your duty to find the defendant not guilty. (T. 151).

I charge you as to the offense of murder or any lesser included offense, the State has the burden of proving the accused to be guilty beyond a reasonable doubt, the State has the necessity of establishing each and every essential part of the crime and each separate fact or link which goes to make the chain of circumstances and all of this

must be proven to you beyond a reasonable doubt. (T. 151).

. . . . .

In connection with the law on self-defense which I have given you, I charge you that in determining whether or not the Defendant acted in self-defense you're instructed that the burden is upon the State to prove to you beyond a reasonable doubt that the Defendant was not acting in self-defense. If you believe that the time and the place alleged [sic] in the indictment that the fatal bullet came from the gun held by the Defendant, but that you further believe that he was justified under one or more principles of law I have given you in charge or that he did so in self-defense of his life or of his person, then it would be your duty to find the Defendant not guilty. (T. 152-53).

I charge you that the mere conjecture or mere suspicion of the Defendant's guilt is

> not sufficient to authorize his conviction under the law. He entered into the trial with the presumption of innocence in his favor and that presumption remains with him through the trial. Every person is presumed innocent until proven guilty. No person shall be convicted of a crime unless such element of such crime is proved beyond a reasonable doubt. (T. 153-54). (Emphasis added).

The specific portion of the above quoted charge attacked by the petitioner is that found on pages 147 and 148 of of the transcript where the jury was charged that, "the law presumes that a person intends to accomplish the natural and probable consequences of his conduct, and where a person uses a deadly weapon in the manner in which such weapons are ordinarily employed to produce death, thereby causing the death of a human being

the law presumes an intention to kill."

The elements of the crime of murder in Georgia are "(1) unlawfully (2) causing the death of another human being (3) with malice aforethought." Holloway v. McElroy, 474 F.Supp. 1363, 1368 (M.D. Ga. 1979). As the trial judge correctly charged the jury in this case, malice is "the unlawful, deliberate intention to kill a human being without excuse, justification or mitigation." It is a "state of mind and is a premeditated, deliberate intention and desire and designed [sic] to unlawfully kill another human being." Thus, "intent to kill" is an integral part of an essential element of the crime of murder, namely malice aforethought. The prosecution had the burden to prove

intent to kill beyond a reasonable doubt.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375 (1970).

In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Court, following In re Winship and its progeny, found constitutional error in a charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The defendant had been convicted of "deliberate

homicide." The statute defined "deliberate homicide" as "purposely or knowingly" causing the death of another human being. The defendant admitted killing the victim but asserted that he did not do so "purposely or knowingly." These words were conceded to be equivalent to "intent" as used in the charge.

The Court held that the charge was error because

> [A] reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary

> actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence--thus effectively shifting the burden of persuasion on the element of intent. 442 U.S. at 517, 99 S.Ct. at 2456, 61 L.Ed.2d at 46-7 (Emphasis in the original).

The charge in the instant case is clearly within the proscription announced in Sandstrom. It is error for the very same reasons stated above. As in Sandstrom, the petitioner, in order to assert his defense, had to admit the facts upon which the presumption announced in the trial court's charge was activated. The jury could have adopted either of the impermissible conclusions of

the law described by the Supreme Court in Sandstrom. As in the previous case of Holloway v. McElroy, supra, this court must find that the charge of the trial court impermissibly shifted the burden of proof on the issue of intent to kill to the defendant or at least removed from the prosecution the full burden resting upon it under In re Winship.

But the state argues in effect that the charge complained of was harmless error. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see United States v. Reeves, 594 F.2d 536, 541 (6th Cir. 1979); Gagne v. Meachum, 602 F.2d 471 (1st Cir. 1979). Throughout the charge, the trial judge instructed the jury not that "intent to kill"

equalled "malice" but that "malice" was the unlawful, deliberate intention to kill a human being without excuse, justification or mitigation." It was a "premeditated, deliberate intention and desire and designed [sic] to unlawfully kill." (Emphasis added.) The court charged several times that the prosecution had to prove malice beyond a reasonable doubt. In addition, and more importantly, the trial judge charged the jury that "the burden is upon the State to prove to you beyond a reasonable doubt that the Defendant was not acting in self-defense." (Emphasis added).

The petitioner's only defense to the charges was self-defense. He thereby controverted only that the killing was unlawful and done with

premeditation and deliberateness. The issue was not "intent to kill" per se but it was the lawfulness of the killing and of petitioner's intentions with respect thereto. Since the charge of the trial judge clearly imposed on the prosecution the burden of proving unlawfulness, premeditation and deliberateness beyond a reasonable doubt and these were the only disputed issues in the case, this court finds that the erroneous charge was harmless beyond a reasonable doubt and thus that the conviction and sentence should not be set aside on this ground.

III. Jury Issues

A. Witherspoon.

The petitioner first alleges that the exclusion by the trial court of

two jurors who were unalterably opposed to capital punishment produced an unrepresentative venire. This contention was rejected in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The petitioner has not alleged sufficient relevant facts to remove this case from the Witherspoon holding and to indicate any entitlement to relief on this ground. See Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980).

The petitioner next contends that one of the two jurors was excused in violation of the standards announced in Witherspoon and its progeny. The colloquy between the district attorney and this juror is set out below:

Q. Are you conscientiously opposed to Capital Punishment? All right, sir, and your name, sir?

A. Frank Brandon

. . . . .

Q. Mr. Brandon, I ask you a further question, have you already decided that should your fellow Jurors find the Defendant guilty of the Capital Offense charged that you will vote so as to avoid the imposition of the death penalty without regard to the facts and circumstances that might emerge during the course of the trial?

A. I'm opposed to capital punishment.

Q. That would be under any circumstances regardless of what the evidence was?

A. I reckon so.

Under Witherspoon and its progeny, a juror may not be excused for mere general scruples or opposition to the

death penalty. The venireman who is excused must make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d at 785 n. 21. (Emphasis added in the original).

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). The excusal of even one juror on grounds broader than announced in Witherspoon is an error fatal to the validity of the death sentence though

not of the conviction. Davis v. Georgia, supra.

The trial judge, cognizant of the Witherspoon issues, considering the questions asked by the district attorney, and observing and listening to the demeanor and tone of voice of the juror, found that Mr. Brandon would vote against the death penalty regardless of the facts and circumstances that may appear at trial and regardless of the law. This court upon an independent analysis and upon the state court's well founded finding of fact, agrees with the trial judge that Mr. Brandon was properly excused.

B. Publicity.

On the morning that the

petitioner's jury was sent out to deliberate, the Macon Telegraph, a newspaper circulated in the county of the petitioner's trial, published an article about the petitioner's trial. In the last paragraph of this article the petitioner's prior 1956 conviction of murder was mentioned. One of the petitioner's counsel saw the article that morning before trial and brought it to co-counsel, Mr. Thompson's attention. Neither counsel knew whether any juror had read the article. Mr. Thompson testified that he had seen one juror, Mr. Phillips, enter the courthouse with some newspaper though he could not be certain which morning or which paper. Mr. Thompson brought the problem to the trial judge's attention who offered

to take appropriate corrective action if desired by defense counsel. Neither counsel requested any corrective action. While at least one lawyer considered a voir dire of the jury, he was concerned about emphasizing the article thru voir dire.

At the hearing on the petitioner's extraordinary motion for a new trial, four jurors testified. Three said that they had not read the article during the trial or afterwards and that neither the article nor petitioner's prior conviction was mentioned during the guilt/innocence phase deliberations. One juror, Mr. Harry Phillips, testified that he had read the article and knew about the prior conviction during

the guilt/innocence deliberations but that that knowledge did not influence his deliberations in any way. His testimony is buttressed by the other juror's testimony that the inadmissible information was never mentioned by anyone during the deliberations.

In Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), the Supreme Court held that, in federal court, a juror's knowledge during the trial of a defendant's prior conviction was presumptively prejudicial. The Court explicitly stated that it was basing its decision on its supervisory powers over the federal courts. In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), the

Supreme Court made clear that the rule announced in Marshall was not the constitutional standard upon which collateral attacks on state convictions would be measured. The Court stated that the Constitution requires impartial, indifferent jurors. All that is required is a juror who can lay aside his impression or opinion and render the verdict solely on the evidence. The only juror who knew about the petitioner's prior conviction did not consider that fact in his deliberations. The prior conviction was never mentioned to the other jurors. Therefore, the petitioner was not prejudiced by the publicity and cannot complain.

In addition, the petitioner's trial counsel knew of the problem

during the trial and thought about the possibility of a voir dire of the jury. The trial judge was willing to take appropriate corrective measures including excusing any juror who had been exposed to the information and replacing that juror with an alternate. The defense counsel, concerned about such a voir dire doing more harm than good, did not ask for any corrective action. Thus the matter cannot now be raised in a habeas proceeding. Rodriguez v. Estelle, 536 F.2d 1096 (5th Cir. 1976).

IV. Georgia Appellate Procedures

The petitioner contends that the "appellate provisions and practices" in death cases deprived him of the

effective assistance of counsel, due process of law, and equal protection of the law. The only factual and legal argument made to support this contention is the failure of the state to require the recording and transcription of counsel's closing arguments on the sentencing phase of the trial. The petitioner contends that this failure results in the appellate courts being unable to review all of the considerations which entered into the jury's finding for the death sentence.

In support of this argument, the petitioner relies principally upon Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The holding of that case does not support the petitioner's argument.

The defendant in Gardner had been sentenced to death by the trial judge in accordance with Florida procedure despite the jury's advisory recommendation of mercy. The trial judge relied in part upon a pre-sentence report which was not disclosed to the defendant or to defense counsel. Gardner was a split decision, but a close reading of the various opinions show that five justices agreed that imposing the death sentence based even in part upon information which was not disclosed to a defendant or his counsel so that it could be examined, supplemented or rebutted violated the Due Process Clause. A sixth justice, Justice White, agreed that using undisclosed information in such manner was error but he based

his decision on the Eighth Amendment instead of due process. The plurality opinion, written by Justice Stevens and joined in by two other justices, did mention the need to include the presentence in the appellate record even if it were permissible to withhold it from the defense. This aside remark must be considered dictum, however.

This case is very unlike Gardner in any event. The arguments of the district attorney were heard by the petitioner and his counsel. When his counsel felt that the prosecutor's arguments were out of bound, they objected and subsequently reconstructed the substance of the argument so that the Georgia Supreme Court could consider the correctness of the

argument. The Georgia court found that the argument was proper and that ruling is not attacked here. Mason v. State, 236 Ga. 46, 48, 222 S.E.2d 339 (1976). No other prejudicial remarks are even suggested by the petitioner. The crux of the matter is that in Georgia closing arguments of counsel are never required to be recorded and/or transcribed except when requested by counsel. Georgia Code Ann. § 27-2401. Petitioner's counsel knew this and further must have observed that the arguments were not being transcribed. Under these circumstances, failure to record and transcribe the closing arguments are not constitutional error.

V. The Voluntary Manslaughter Charge

The petitioner argues that the trial judge erred when he, in charging on voluntary manslaughter, stated that "if there should have been an interval between the assault or provocation given and the homicide sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and shall be punished as murder." This charge is an almost exact quote from the statute and correctly states the Georgia law. In Georgia voluntary manslaughter, is defined in terms of an objective or reasonable man standard. Though a defendant must have acted under sudden passion to claim the lesser penalty of manslaughter, he must in

addition have acted based upon provocation that would excite a reasonable person. In conformity, the "cooling off" period after which the killing is murder must also be judged by a reasonable man standard, and that is the effect of the judge's charge. No constitutional error exists where the crime is properly described to the jury as the state legislature defined it.

This court finds no errors in the petitioner's trial, sentencing, or appeal which support setting aside either his conviction or his sentence. Accordingly, the petition for a writ of habeas corpus is hereby denied.

The stay of execution issued on June 5, 1979 shall remain in force

and effect until such time as respondents move for dissolution on account of the petitioner's failure to appeal or affirmance after appeal.

APPENDIX C

IN THE UNITED STATED COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 80-7344

Guy Mason,

Petitioner-Appellant,

versus

Charles R. Balkcom,
Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING

April 6, 1982

Before TUTTLE, HILL and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 80-7344

Guy Mason,

Petitioner-Appellant,

versus

Charles R. Balkcom,
Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

O R D E R:

( ) The motion of appellee for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(x) The motion of appellee for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 29, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ THOMAS A. CLARK
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 80-7344

Guy Mason,

Petitioner-Appellant,

versus

Charles R. Balkcom,
Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

O R D E R:

( ) The motion of _____ for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk

of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(x) The motion of appellee, Charles R. Balkcom, Warden, for a further stay of the issuance of the mandate is GRANTED to and including July 6, 1982, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ THOMAS A. CLARK
United States Circuit Judge

APPENDIX D